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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

US MAGNESIUM, LLC, a Delaware limited liability company, Plaintiff, vs. ATI TITANIUM, LLC, a Delaware limited lability company, ALLEGHENY TECHNOLOGIES, INC., a Delaware corporation, and DOES 1-20, Defendants.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT ALLEGHENY TECHNOLOGIES INCORPORATED'S MOTION TO DISMISS [DKT. 16]** Civil No. 2:16-cv-01158-TS District Judge Ted Stewart

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Plaintiff, by and through counsel, hereby submit this memorandum in opposition to Defendants Allegheny Technologies Incorporated's Motion to Dismiss (the "Motion," Dkt. 16).

INTRODUCTION

Allegheny Technologies Incorporated ("ATI") is a multi-billion dollar enterprise, with myriad subsidiaries, and with plants and administrative offices all over the globe.[1] About twelve years ago, in the summer of 2005, ATI began exploring the idea of constructing a titanium sponge manufacturing plant in Rowley, Utah. And, Utah had much to offer. In this regard, ATI needed magnesium in order to complete its titanium sponge manufacturing process, and the Utah-based company, US Magnesium ("US Mag"), could offer a steady supply of magnesium. Even better, US Mag could re-use the chemical waste from ATI's manufacturing process, magnesium chloride, to make new magnesium. If the companies entered into a business relationship, ATI and US Mag could have a symbiotic relationship, cycling materials back and forth in a way that would yield enormous efficiencies for both companies.

As negotiations got under way, US Mag offered ATI 900 acres of real property adjoining its own facilities – a significant advantage for ATI, because this would cut to a minimum its transportation costs for raw material, and allow ATI to receive molten magnesium that would not have to be re-melted. While ATI considered this offer, it also sought other perks. With the promise of bringing jobs and long-term investment to the region, it induced Tooele County to create a special economic development district encompassing the area designated for its new titanium sponge plant. With similar promises, it induced the State of Utah to offer even more;

[1] *See* ATI's website, www.atimetals.com.

the Governer's Board of Economic Development approved over $3 million in tax incentives to bring the company into the state.

In 2005 and early 2006, executives from ATI traveled to Utah for discussions and negotiations. In January, 2006, ATI signed a Confidentiality Agreement with US Mag. Three months later, ATI received directly from US Mag a significant promise: that if ATI went ahead with construction of its Rowley titanium sponge facility, then for the next twenty years, US Mag would sell molten magnesium from its Rowley facility to no titanium producer other than ATI.

After US Mag, state authorities, and local authorities had worked for months to bring this deal to fruition, and after US Mag and ATI had finally agreed on terms for their Supply Agreement, it was time to put ink to paper and make the Supply Agreement official. On August 31, 2006, ATI established a subsidiary, ATI-Titanium ("ATI-Ti"), as a new LLC licensed to do business in Utah – with all of the new LLC's managers drawn from ATI's own pool of executives. The very next day, ATI's CEO, holding no discernable position with this new LLC, signed the Supply Agreement, purporting to act on behalf of its new controlled entity.

Everyone understood what was going on here: ATI and ATI-Ti were one and the same. All notices under the Supply Agreement were to be delivered to ATI headquarters in Allegheny, Pennsylvania. The new plant would feature the ATI logo. High-level operational concerns would be directed straight to ATI executives. ATI-Ti's only "customer" would be ATI. The ATI CEO himself, who owned a home in Salt Lake City, appeared at the new plant's 2007 ground-breaking ceremony and posed for a picture with Utah's then-governor. Eventually, construction was finished, well over a hundred new Utahns were put to work, and the plant became operational.

Like any sophisticated business parties, US Mag and ATI anticipated the possibility of market changes. When they negotiated the Supply Agreement, they knew that at some point in the future, some other supplier of magnesium or titanium sponge could conceivably offer ATI a better deal. Therefore, as part of their Supply Agreement, US Mag and ATI agreed on an "economic force majeure" ("EFM") provision, by which, at any time over the course of their relationship, ATI could approach US Mag with a competing offer from another supplier; US Mag could then investigate and audit that offer; and then, if the competitor's offer passed rigors, US Mag could either offer to match the competitor, or permit ATI to be released from the terms of the Supply Agreement.

In the late summer of 2016, ATI-Ti declared that it had found a titanium sponge supplier, so that the company could buy sponge instead of produce it – eliminating ATI's need for magnesium. ATI stated that it would be ramping down its purchase of magnesium from US Mag, effective immediately. There had been no presentation of a competing offer to US Mag; there had been no audit; the EFM provision had been entirely bypassed and ignored. US Mag's costly electrolytic cells, used to produce material for ATI, and relying on a steady supply of magnesium chloride from ATI in order not to degrade and break down, would become dormant, causing irreparable damage.

The sudden breach was bizarre; a bona fide competing offer would have entitled ATI-Ti to rightfully invoke the EFM provision, to potentially cut an even more profitable deal from US Mag, keep the Rowley plant in operation, and spare nearly 140 Utah workers their jobs. At the very least, if ATI-Ti had appropriately invoked the EFM and permitted the audit process to go forward, ATI-Ti could have escaped any liability for breach even if it went with a new supplier.

But, the call was not in ATI-Ti's hands. It was the parent company, ATI, that decided to shut down Rowley and have ATI-Ti breach its contract. Thereafter, US Mag brought the instant suit against both ATI-Ti and ATI.

After executing multiple contracts directly with a Utah corporation; after sending its executives into and out of the state to take advantage of its resources; after years of not only availing itself of Utah's laws, but actually going so far as to instigate the creation of *new* laws (*e.g.*, resolutions and at least one ordinance) for its benefit; and after unilaterally making the decision to have ATI-Ti breach its contract, forcing the company to shutter its doors and lay off its employees, ATI now incredulously argues that it has insufficient contacts with Utah to warrant personal jurisdiction, and that Plaintiff's alter ego claim should be dismissed. The company's motion is without merit.

Plaintiff's complaint sets forth numerous facts showing that ATI had a unity of interest with its Utah subsidiary, ATI-Ti; that it exercised dominion and control over the subsidiary; and that coporate lines between the two entities were blurred. In the declaration submitted by ATI in support of its motion for dismissal, ATI makes much ado of its alleged compliance with corporate formalities such as minute-keeping and separate bank accounts, but ATI's declaration is conclusory and leaves most of the pertinent allegations of the Complaint undisputed. Perhaps most significantly, ATI does not dispute that it purposefully directed wrongful activity toward a Utah company, in that it made the decision to have ATI-Ti breach the Supply Agreement, injuring US Mag on the order of over a hundred million dollars. For purposes of this motion to dismiss, the Court must accept all of the undisputed allegations as true, and should find that they constitute ample grounds to support both personal jurisdiction and Plaintiff's substantive alter ego claim.

While the Complaint follows notice-pleading standards and therefore does not go into great detail about ATI's history with Utah, nor its relationship to ATI-Ti or US Mag, Plaintiff presents the Court with two declarations providing substantial evidence pertinent to personal jurisdiction and alter ego – all of which further demonstrate that dismissal is inappropriate. The declarations show that ATI itself engaged in substantial negotiations and deal-making in Utah; and show a history that betrays ATI's complete dominance and control over the dummy subsidiary, such that ATI's contacts with Utah far surpass the "minimum contacts" threshold, and an alter ego claim is proper.

At the very least, and as further discussed in the Rule 56(d) motion filed concurrently herewith, the Court should permit Plaintiff discovery to explore matters pertinent to jurisdiction and to the alter ego claim.

ATI's motion to dismiss should be denied.

RESPONSE TO ATI'S STATEMENT OF FACTS[2]

Although the rules do not require US Mag to respond to ATI's facts, US Mag provides responses for the Court's convenience, to note several matters which are in dispute. US Mag objects to the Court's consideration of any of ATI's representations of fact, for purposes of ATI's motion under Rule 12(b)(6). *See Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) (on a Rule 12(b)(6) motion, unlike with a motion to dismiss on jurisdictional grounds, the Court must examine only the complaint).

[2] Any undisputed facts are undisputed for purposes of this motion only.

ATI's Statement of Fact	**Plaintiff's Response**
1. ATI is the parent holding company of numerous subsidiaries that produce specialty materials and components. The company's subsidiaries currently produce a wide-range of products, including titanium and titanium alloys, nickel-based alloys and superalloys, engineered forgings and castings, zirconium, hafnium, niobium alloys, and stainless and specialty steels. *See* Declaration of G. Scott Rantovich attached as Exhibit A, at ¶ 2.	1. This is background information, and largely irrelevant to the issues before the Court on the instant motion.
2. ATI is incorporated under the laws of the State of Delaware. Its principal executive offices are located in Pittsburgh, Pennsylvania. *Id.* at ¶ 3.	2. Undisputed.
3. ATI is not authorized to conduct business in the State of Utah and does not maintain a registered agent in this state. *Id.* at ¶ 4. It does not engage in any systematic or continuous business activities in the state. In particular, ATI does not: a. maintain any licenses to conduct business in Utah; b. own, lease, or control any property or assets in the state; c. employ any individuals in Utah; d. maintain any offices within this state; e. maintain any bank accounts in this state; f. maintain any phone or fax listing within this state; g. advertise or solicit business in this state; h. pay any taxes within this state; i. generate a substantial percentage of national revenue from activities conducted in this state. *Id.* at ¶ 4.	3. Disputed. Through its subsidiary, agent, and alter ego, ATI-Ti, ATI has continuous and systematic activities in the state. As alleged in the Complaint, ATI dominates and controls ATI-Ti, such that ATI-Ti's in-forum activities – including in-state business licenses, employees, ownership of real property, and payment of taxes – should be imputed to ATI. facility in Rowley, and later by dominating and controlling that facility. (*See* SOF ¶¶ 3-53 below.)
4. ATI is publicly-traded on the New York Stock Exchange. Id. at ¶ 5. The company complies with all applicable federal and state securities regulations, and submits annual	4. Undisputed. That ATI is publicly traded; that it purports to comply with securities regulations; and that it purports to uphold corprorate formalities is irrelevant to the instant motion. Plaintiff's complaint alleges

and quarterly reports to the United States Securities & Exchange Commission (the "SEC"). *Id.* It holds a regular annual meeting; is governed by a duly-appointed board of directors; keeps regular minutes, books, and records; and observes all other corporate formalities required of publicly-traded entities. *Id.*	that *ATI-Ti's* veil should be pierced, and alleges nothing with respect to the piercing of the veil of *ATI.* Therefore, the facts set forth in this paragraph are just a distraction. Further, they do not contradict any allegations of the Complaint.
5. ATI also prepares regular consolidated financial statements for the company and its various subsidiaries. These financial statement are periodically audited by the company's auditors, Ernst & Young, and regularly reported to the SEC and other regulatory bodies. *Id.* at ¶ 6.	5. Undisputed. Again, ATI's own compliance with formalities is not at issue here; this paragraph is another distraction. These facts do not contradict any allegations of the Complaint. Further, the consolidated financial statements show that ATI deems the business of ATI-Ti to be its own.
6. Like many publicly-traded entities, ATI organizes its operations into a number of subsidiaries and divisions for both legal reasons and operational efficiencies. *Id.* One of ATI's indirect subsidiaries is ATI-Ti, the lead defendant in this action. *Id.* This entity was formed in approximately 2006 in order to own and operate a titanium sponge manufacturing facility located in Rowley, Utah. *Id.* at ¶ 7.	6. Undisputed. But for the issue of ATI-Ti being an indirect subsidiary, rather than a direct subsidiary, these facts are consistent with those alleged in the Complaint. (*See* Compl., ¶¶ 2-3.)
7. ATI-Ti is a separate and independent legal entity from ATI, which is several degrees of corporate ownership removed from ATI. *Id.* at ¶ 8. Specifically, ATI-Ti is a limited liability company organized under the laws of the State of Delaware. Its sole member is TDY Industries, LLC, which is a California limited liability company. TDY Industries, LLC, in turn, is wholly-owned by TDY Holdings, LLC, which is owned by ATI Operating Holdings, LLC, which is owned ATI Funding Corp., a subsidiary of ATI. *Id.* In other words, ATI-Ti is an indirect subsidiary of ATI that is approximately five degrees of ownership removed from its parent. *Id.*	7. Partially disputed. The assertion that ATI-Ti is a "separate and independent legal entity from ATI" constitutes not a fact, but a legal conclusion. Also, the degree of alleged separation between ATI and ATI-Ti is insignificant for purposes of the instant motion, because ATI is conspicuously silent about its percentage interest in all of these intermediary companies, and its control over them. The fact that ATI's attorneys were creative in their establishment of multiple-layers of dummy entities does not contradict Plaintiff's allegation that ATI dominates and controls ATI-Ti, and it does not defeat a finding of alter ego.

	ATI-Ti's Rule 7.1 corporate disclosure statement shows ATI's direct line of ownership over ATI-Ti: "ATI Titanium LLC's sole member is TDY Industries, LLC, whose sole member is TDY Holdings, LLC, whose sole member is ATI Operating Holdings, LLC, whose sole member is ATI Funding Corp., which is owned by Allegheny Technologies Incorporated[.]" (*See* Dkt. 19.)
8. ATI and ATI-Ti are completely separate entities, with their only relationship being that of a parent and indirect subsidiary. ATI does not oversee the day-to-day operations of ATI-Ti; rather, these activities are managed by ATI-Ti's employees and management team. ATI and ATI-Ti maintain separate and independent by-laws, minutes, corporate records, financial records, and bank accounts. *Id.* at ¶ 9.	8. Disputed. Again, the assertion that ATI and ATI-Ti are "completely separate entities" is not a fact, but a legal conclusion. US Mag's current Vice President of Sales, Cameron Tissington, has submitted a declaration that specifically disputes ATI's assertion that it "does not oversee the day-to-day operations of ATI-Ti." (*See* Jan. 3, 2017 Tissington Declaration ("Tissington Decl"), at ¶¶ 12-14.) As set forth in the Cowart and Tissington Declarations, at all relevant times, there was substantial overlap between the executives and officers of ATI and those of ATI-Ti. (*See* Jan. 3, 2017 Cowart Declaration ("Cowart Decl."), at ¶¶ 4-13; Tissington Decl., at ¶¶ 12-14.) ***ATI does not dispute this.*** Further, while ATI claims ATI-Ti had separate bylaws, ATI does not provide those bylaws and, more importantly, does not assert, let alone show, that ATI-Ti *complies* with its own bylaws. ATI does not provide any information about ATI-Ti's maintenance of corporate records and, given the fact that all notices under the

	Supply Agreement were to be directed straight to ATI headquarters (*see* SOF ¶ 25 below), the Court can infer that it was ATI itself that kept ATI-Ti's records – maybe in a separate file drawer. What is more, even if ATI-Ti nominally has its own bank accounts, ATI says nothing about its control over ATI-Ti's bank accounts and the funds therein. None of the facts set forth in this paragraph defeat a claim of alter ego.
9. ATI and ATI-Ti are also financially independent of each other. ATI-Ti was fully capitalized and operates under its own budget. It is responsible for its own profits and losses, which are separately tracked by the company. Although ATI does file some government mandated consolidated financial reports, such as Annual Reports on Form 10-K under the Securities Exchange Act of 1934, ATI and its subsidiaries still maintain separate financial records. *Id.* at ¶ 10.	9. Disputed. ATI admits that it reports ATI-TI's financial performance as its own. (*See* G. Scott Rantovich Decl., at ¶ 6.) The fact that ATI filed consolidated reports is consistent with the allegations of the Complaint and goes to show ATI's dominance and control. Because ATI caused ATI-Ti's incorporation, the Court can infer that ATI provided its capitalization. (*See* SOF ¶¶ 16, 21-22 below.) Also, the undisputed allegation that ATI made the decision to close the ATI-Ti Rowley plant shows anything but independence. Further, ATI's assertion that ATI-Ti "was fully capitalized" is another bald legal conclusion, where ATI says nothing about the *amount* of its subsidiary's capitalization. The assertion that ATI-Ti is "responsible for its own profits and losses" says nothing. (Responsible to whom? And for what?) The asserted "separate tracking" of ATI-Ti's financials suggests no more than that ATI kept tabs on that division's profits. Again, this does not defeat a claim for alter ego – particularly if there were non-arm's-length

	transactions, or if ATI exercised control over what happened to its subsidiary's funds. Finally, the nominal keeping of "separate financial records" means little if the records are all housed in the same headquarters and controlled by the same individuals. (*See* SOF ¶ 25 below.)
10. Plaintiff filed its Complaint against ATI-Ti and ATI on October 12, 2016. In factual terms, the Complaint alleges that the Plaintiff and ATI-Ti entered into a Supply and Operating Agreement in which ATI-Ti agreed to purchase magnesium from the Plaintiff for use in manufacturing titanium sponge. *See* Complaint at ¶ 12. Plaintiff contends that ATI-Ti has anticipatorily breached the Agreement by improperly invoking an economic force majeure provision and by refusing to continue to accept shipments of product. Plaintiff seeks approximately $125 million in damages as well as declaratory relief against ATI-Ti. *Id.* at ¶ 46.	10. The Complaint speaks for itself.
11. Notably, there are no substantive claims for relief pled against ATI. *See* Complaint at ¶¶ 33-51. Instead, Plaintiff alleges that ATI should be a defendant in this action because it is the "alter ego" or agent of ATI-Ti. *Id.* at ¶ 12.	11. Disputed. US Mag is making "substantive" claims against ATI as the alter ego and principal of ATI-Ti. While there are currently no claims pled directly against ATI, US Mag reserves its right to later amend and assert such direct claims.
12. Plaintiff's allegations against ATI – all of which are pled "on information and belief" – are restated as follows: • On information and belief, at all relevant times, there was such a unity of interest and ownership that the	12. The Complaint speaks for itself. ATI restates *some* of the allegations of the Complaint. However, as the Court can see, not all of these allegations are pled "on information and belief."

separate personalities of the ATI-Ti and ATI did not exist and instead an alter ego relationship existed involving, *inter alia*, commingling of business operations; common management and legal representation; sharing of headquarters and employees in Pittsburgh, Pennsylvania; non-arm's length transactions; issuing consolidated summaries of operations and financial statements; and undercapitalization on the part of ATI-Ti. • ATI completely dominates and controls ATI-Ti such that ATI-Ti is its mere instrumentality and agent. The managers of ATI-Ti are all directors, officers, or in-house counsel of ATI, who manage ATI-Ti in the interests of ATI. Further, ATI holds itself out as owning and controlling the Titanium Sponge Plant, frequently publicly refers to the Titanium Sponge Plant as "our Rowley, UT facility," and presents ATI-Ti's operations and financial performance as that of its own in its communications with shareholders, the government, and the public. Using its dominion and control over ATI-Ti, ATI made business decisions for ATI-Ti, including a recently-announced decision to idle the Titanium Sponge Plant. In this regard, ATI issued a press release dated August 24, 2016, in which ATI characterized the idling of the Titanium Sponge Plant as an action that ATI itself was taking. • On information and belief, on account of the undercapitalization of ATI-Ti, it is unable to fully compensate Plaintiff for the damages caused by the wrongful actions of ATI-Ti alleged herein;	Further, ATI has left out Complaint paragraph 8, which alleges, "Under the circumstances, an injustice would result unless the separate legal existences of the ATI-Ti and ATI are disregarded and they are held jointly and severally liable for the damages claimed herein." **ATI does not dispute most of these allegations. And to the extent ATI disputes them, as explained above, ATI often relies on statements that are bald and conclusory.**

• …. By virtue of ATI's alter ego and principal-agent relationship with ATI-Ti, and ATI's actions and decisions directed towards this forum regarding matters at issue in this lawsuit, including the decision to idle the Titanium Sponge Plant, ATI is subject to personal jurisdiction in this Court. *Id.* at ¶¶ 5-7, 10.	

PLAINTIFF'S STATEMENT OF ADDITIONAL FACTS

Relevant Allegations of the Complaint

1. The complaint alleges as follows with respect to ATI:

Defendant [ATI] is a Delaware corporation with a place of business in Allegheny County, Pennsylvania. ATI is the sole owner and member of ATI-Ti. (¶ 3.)

On information and belief, at all relevant times, there was such a unity of interest and ownership that the separate personalities of the ATI-Ti and ATI did not exist and instead an alter ego relationship existed involving, inter alia, commingling of business operations; common management and legal representation; sharing of headquarters and employees in Pittsburgh, Pennsylvania; non-arm's length transactions; issuing consolidated summaries of operations and financial statements; and undercapitalization on the part of ATI-Ti. (¶ 5.)

ATI completed dominates and controls ATI-Ti such that ATI-Ti is its mere instrumentality and agent. The managers of ATI-Ti are all directors, officers, or in-house counsel of ATI, who manage ATI-Ti in the interest of ATI. Further, ATI holds itself out as owning and controlling the Titanium Sponge Plant, frequently publicly refers to the Titanium Sponge Plant as "our Rowley, UT facility," and presents ATI-Ti's operations and financial performance as that of its own in its communications with shareholders, the government, and the public. Using its dominion and control over ATI-Ti, ATI made business decisions for ATI-Ti, including a recently-announced decision to idle the Titanium Sponge Plant. In this regard, ATI issued a press release dated August 24, 2016, in which ATI characterized the idling of the Titanium Sponge Plant as an action that ATI itself was taking. (¶ 6.)

On information and belief, on account of the undercapitalization of ATI-Ti, it is unable to fully compensate Plaintiff for the damages caused by the wrongful actions of ATI-Ti alleged herein. (¶ 7.)

> Under the circumstances, an injustice would result unless the separate legal existences of the ATI-Ti and ATI are disregarded and they are held jointly and severally liable for the damages claimed herein. (¶ 8.)
>
> … By virtue of ATI's alter ego and principal-agent relationship with ATI-Ti, and ATI's actions and decisions directed towards this forum regarding matters at issue in this lawsuit, including the decision to idle the Titanium Sponge Plant, ATI is subject to personal jurisdiction in this Court. (¶ 10.)

2. G. Scott Rantovich, a representative of ATI, has submitted a declaration in support of ATI's motion for dismissal. Therein, Rantovich makes numerous conclusory statements about ATI's and/or ATI-Ti's operations; however, Rantovich does NOT dispute the following facts alleged in the Complaint:

a. ATI and ATI-Ti have common managers and legal representation;

b. ATI and ATI-Ti share headquarters and employees in Pittsburgh;

c. There have been non arm's-length transactions between ATI and ATI-Ti;

d. ATI and ATI-Ti publish consolidated business summaries and financial reports;

e. The managers of ATI-Ti are all directors, officers, or in-house counsel of ATI, who manage ATI-Ti in the interest of ATI;

f. In its communications with shareholders, the government, and the public, ATI holds itself out as owning and controlling the Titanium Sponge Plant, frequently publicly refers to the Titanium Sponge Plant as "our Rowley, UT facility," and presents ATI-Ti's operations and financial performance as that of its own; and

g. ATI makes business decisions for ATI-Ti, including a recently-announced decision to idle the Titanium Sponge Plant. ATI issued a press release dated August 24, 2016, in which ATI characterized the idling of the Titanium Sponge Plant as an action that ATI itself was taking.

History of ATI's Relationship with US Magnesium

3. Plaintiff is a producer and supplier of magnesium, operating out of a manufacturing facility (the "Rowley Facility") in or near Rowley, Utah. Defendant ATI is the

parent company of ATI-Ti, the manufacturer of titanium sponge products in a plant ("ATI Plant") located adjacdent to the US Mag Rowley Facility. (Compl., ¶¶ 1-3, 11.)

4. Beginning in mid-2005, ATI and US Mag entered into discussions with regard to ATI's purchase of magnesium from US Mag and to ATI's possible construction of the ATI Plant on what was then US Mag property. (*See* Jan 3, 2017 Tissington Decl. ("Tissington Decl."), ¶¶ 4-5; *see also* recitals in Jan. 24, 2006 Confidential Disclosure Agreement, ("Confidentiality Agreement"), Ex. 1 thereto.)

5. In connection with these discussions, executives from ATI made several visits to Utah, including one in which they toured the Rowley Facility. (Tissington Decl., ¶ 3.)

6. As ATI and US Mag both recognized, a symbiotic relationship between the two companies could be very benficial to both. US Mag could supply magnesium to ATI; ATI could use that magnesium to create its titanium sponge product; ATI could return the byproduct magnesium chloride to US Mag, then US Mag could use magnesium chloride to make new magnesium to supply to ATI. (Compl., ¶¶ 11-13.)

7. To facilitate further discussion about a potential deal between the parties, and to protect sensitive business information, on January 24, 2006, ATI and US Mag entered into a Confidentiality Agreement. (Tissington Decl., ¶ 4, Ex. 1 thereto.) By means of the Confidentiality Agreement, ATI and US Mag promised that they would not disclose information "to other than its officers, directors, employees, and consultants, who need to receive such [information] for purposes of discussion, and who are informed of the obligations of this agreement." (*Id.* at ¶ 1.)

8. The Confidentiality Agreement was signed by Jon D. Walton, Executive Vice President of ATI. (*Id.*) At that time, ATI-Ti did not exist. (*See* Jan. 3, 2017 Cowart Decl. ("Cowart Decl."), ¶¶ 8-9, Exs. 5, 6 thereto.)

9. The obligations between ATI and US Mag, as set forth in the Confidentiality Agreement, were to continue for a period of ten (10) years following the last date of disclosure. (*See* Confidentiality Agreement, ¶ 8, Ex. 1 to Tissington Decl.)

10. On or about April 12, 2006, as discussions continued, ATI and US Mag entered into another agreement (hereafter, the "Exclusivity Agreement") to facilitate ATI's "exploratory process," so that ATI could "more thoroughly study the feasibility of the construction on USMAG's Adjacent Property of a Titanium Sponge Plant ***to be owned and operated by ATI.***" (*See* Tissington Decl., ¶ 6, Ex. 2 thereto, at p. 1 (emphasis added).)

11. The Exclusivity Agreement expressly referenced and affirmed the "full force and effect" of the prior Confidentiality Agreement between ATI and US Mag. (*See* Tissington Decl. Ex. 2, ¶ 6.)

12. The Exclusivity Agreement anticipated, among other things, (1) ***ATI's*** exploration of the availability of infrastructure and utilities "to serve ***ATI's*** Titanium Sponge Plant"; (2) ***ATI's*** exploration of the environmental condition and suitability of US Mag's property, and the availability of environmental permits for the operation of "***ATI's Titanium Sponge Plant***"; (3) "the ability of ***ATI*** to acquire on reasonable commercial terms and conditions the necessary knowhow and process technology" for the anticipated titanium sponge production; (4) ***ATI's*** purchase of the subject real property owned by US Mag; (5) ***ATI's*** purchase of

magnesium chloride from US Mag; and (6) ***ATI*** "entering into a final agreement(s) with US Mag in order to complete ***ATI's Titanium Sponge Plant.***" (*See id.*, ¶¶ 1-2 (emphasis added).)

13. The Exclusivity Agreement provided:

> The parties [ATI and US Mag] will, during the period the feasibility study is in progress, negotiate in good faith the agreements that ***they would expect to sign*** at the end of the feasibility study period if ***ATI*** elects to proceed with the project. It is the goal of the parties to have all necessary agreements in final, agreed, signature ready form at or within a reasonable period after the conclusion of the feasibility study period.

(*Id.*, ¶ 3 (emphasis added).)

14. The Exclusivity Agreement further provided as follows:

> As an inducement for ATI to expend time and incur expenses (including certain expenses incurred by USMAG which require ATI's advance written approval) to undertake the feasibility study for a Titanium Sponge Plant on USMAG's Adjacent Property, ***USMAG hereby expressly acknowledges and agrees that its relationship with ATI is exclusive, and accordingly, USMAG shall not offer, arrange, or participate in any way without ATI regarding the location of any Titanium Sponge Plant on USMAG's Adjacent Property*** and shall remain so during the term of this agreement and for a period of three (3) years after the termination thereof; provided, however, that if ATI begins construction of a new Titanium Sponge Plant elsewhere during the three year period, this exclusivity period would terminate. ***In the event ATI agrees to build the Titanium Sponge Plant on USMAG's Adjacent Property, the exclusivity would last for a period of at least twenty years, and USMAG would supply molten magnesium for titanium sponge exclusively to ATI; provided, however, that in the event ATI fails to purchase a minimum of 5,000 TPY of magnesium from USMAG for two consecutive calendar years, or in the alternative fails to reasonably offer to compensate USMAG for such failure, USMAG would have the right to terminate the foregoing exclusivity provision.***

(*Id.*, ¶ 5 (emphasis added).)

15. The Exclusivity Agreement was signed by Jon D. Walton, Executive Vice President of ATI. (*Id.*) At this time, ATI-Ti still did not exist. (*See* Cowart Decl., ¶¶ 8-9, Exs. 5, 6 thereto.)

16. On or about May 18, 2006, ATI formed ATI-Ti as a Delaware LLC. (*See* Cowart Decl., ¶ 8, Ex. 5 thereto.) ATI-Ti was not authorized or registered to do business in Utah. (*Id.*, ¶ 9, Ex. 6 thereto.)

17. On or about June 16, 2006, the *Salt Lake Tribune* reported that the Utah Governor's Office of Economic Development ("GOED") Board had "offered Allegheny Technologies Inc. as much as $3.25 million as an incentive to persuade the Pittsburgh, Pa metals manufacturer to expand in Tooele County." The *Tribune* further reported:

> In its application for state money, Allegheny said it is looking for a site on which to build a $300 million manufacturing facility that would employ approximately 150 people earning an average of more than $45,000 annually. The company would not divulge where it is considering building in Tooele County.

(*See* Cowart Decl., ¶ 20, Ex. 13 thereto.)

18. The GOED approves such tax incentives based on, among other things, a company's promise to bring jobs to Utah, and plans for long-term capital investment. (*See* Cowart Decl., ¶¶ 40-41, Ex. 24 thereto.)

19. On or about June 26, 2006, ATI filed with the U.S. Securities and Exchange Commission ("SEC") a press release (hereafter, the "June 26 Press Release") entitled, "Allegheny Technologies announces New Premium-Grade Titanium Sponge Facility." (*See* Cowart Decl., ¶¶ 22-23, Ex. 14 thereto.) The June 26 Press Release stated, among other things:

> ***Allegheny Technologies Incorporated*** (NYSE: ATI) announced today that ***its Board of Directors has approved a greenfield premium-grade titanium sponge facility to be built in Rowley, UT*** with an annual capacity of 24 million pounds. This $325 million investment is aimed at ***increasing ATI's capacity*** to produce titanium alloys for aerospace and defense applications. … ***ATI*** expects initial production to begin in the third quarter 2008.
>
> . . .

> This Phase IV titanium expansion brings ***ATI's projected total annual titanium sponge capacity*** to approximately 40 million pounds. . . .
>
> The Board's approval of the Phase IV expansion is contingent upon the satisfactory completion of appropriate arrangements relating to the acquisition of and use of property, incentives from the State of Utah and the County of Tooele, and the supply of raw materials and utilities.

(*Id.*)

20. ATI did, in fact, make arrangements with the County of Tooele, for purposes of enabling the Rowley facility's anticipated future operations. The July 11, 2006 minutes of the Redevelopment Agency ("RDA") for Tooele County note that the RDA is considering "Resolution 2006-02," authorizing an "economic development project" for the "North Rowley Economic Development Project Area." (Cowart Decl., ¶¶ 17-19, Ex. 12 thereto.) The RDA minutes state, among other things:

> This project with Allegany [sic] Technologies would create a plan that would be worth just a little over 300 million and would employ 130-150 people in the first phase. They would be located north of Rowley and would work in conjunction with US Magnesium. . . .

(*Id.*) The RDA approved the preparation of a draft "project area plan" for ATI; and also approved the hiring of an economist to do "preliminary field work" for ATI. (*Id.*)

21. On or about August 31, 2006, pursuant to an expedited Application for Authority to Transact Business, ATI caused ATI-Ti to become registered to do business in Utah. (Cowart Decl., ¶ 10, Ex. 7 thereto.)

22. Like ATI's Exclusivity Agreement, the ATI-Ti application to do business in Utah was signed by ATI Executive Vice President Walton, and Walton was listed as one of ATI-Ti's original managers. (*Id.*) ATI-Ti's additional managers were Richard J. Harshman

("Harshman"), and Dale G. Reid ("Reid"). (*Id.*) Harshman and Reid were executives of ATI. (Cowart Decl., ¶¶ 10-11, Ex. 8 thereto.)

23. On September 1, 2006, ATI's CEO L. Patrick Hassey (hereafter, "CEO Hassey"), nominally acting on behalf of the new entity, ATI-Ti, executed a Supply and Operating Agreement with US Mag (the "Supply Agreement"). (*See* Dkt. 2-1.) At that time, by public records, Hassey did not hold any position with ATI-Ti. (*See* Cowart Decl., ¶ 10, Ex. 7 thereto.)

24. CEO Hassey had a residence in Salt Lake City, Utah. (*See* Cowart Decl., ¶ 34, Ex. 18 thereto.)

25. Notices under the Supply Agreement were to be addressed to ATI-Ti "c/o [ATI]," and "with a copy to" ATI. (*See* Dkt. 2-1, Supply Agreement, ¶ 13.4.)

26. The Supply Agreement expressly references and affirms the Exclusivity Agreement between ATI and US Mag. (*Id.*, ¶ 13.5.) Specifically:

> …Notwithstanding this integration clause, the parties hereby agree and acknowledge that the Agreement between Allegheny Technologies Incorporated and Seller dated April 12, 2006 [i.e., the Exclusivity Agreement] (the "April 12, 2006 Agreement") is in no way merged into, modified by, or canceled by this Agreement, and that ***the April 12, 2006 [Exclusivity] Agreement, including, without limitation, Section 5 thereof, survives in full force and effect.***

(*Id.* ¶ 28 (emphasis added).)

27. The continuing force and effect of paragraph 5 of the Exclusivity Agreement, together with ATI's decision to build the titanium sponge plant contemplated therein, meant that for the next twenty years, US Mag had the obligation to supply molten magnesium from its Rowley facility to no titanium producer other than ***ATI***. (*See* ¶ 14, *supra*.)

28. The Supply and Operating Agreement provides that Utah law will govern any disputes arising under the contract. (*See* Dkt. 2-1, Supply Agreement, ¶ 13.3.)

29. On October 24, 2006, the Tooele County Commission approved an ordinance establishing the North Rowley Economic Development Project Area Plan (the "Tooele Development Plan"), as further incentive for ATI's operations. The Tooele Development Plan provided for use and development of real property encompassing the land on which ATI had planned to construct its titanium facility. (*See* Cowart Decl. ¶ 14, Ex. 11 thereto.)

30. On October 25, 2006, Allegheny conducted its Q3 2006 Conference Call, a transcript of which was attached to an SEC 8K filing, wherein ATI's principals delivered an update on "ATI's strategic growth projects in titanium product and nick-based alloys." (Cowart Decl., ¶ 24, Ex. 15 thereto.) The meeting discussed ATI's actions in Utah as follows:

- Engineering and design of ***our Rowley, UT titanium sponge facility*** is underway, and we still expect sponge production to begin in late 2008 and grow to an annualized rate of 24 million pounds in 2009.

- When these current phases are completed, ***ATI will have internal titanium sponge capacity*** of approximately 40 million pounds.

(*Id.* (emphasis added).)

31. On November 1, 2006, Lynn Davis, who was an executive with ATI, purporting to act on behalf of ATI-Ti, executed a Purchase and Sale Agreement (the "P&S Agreement") by which ATI-Ti purchased from US Mag the land for the Rowley facility. (*See* Tissington Decl., ¶ 10, Ex. 3 thereto.) At the time, Lynn Davis was Business Unit President of ATI Wah Chang; he later became ATI's "Group President, ATI Primary Metals." (*See* Cowart Decl., ¶ 7, Ex. 4 thereto.)

32. The P&S Agreement, like the Supply Agreement, expressly reaffirmed the Exclusivity Agreement between ATI and US Mag. In this regard, the P&S Agreement stated:

> Notwithstanding this integration clause, the parties hereby agree and acknowledge that the Agreement between Allegheny Technologies Incorporated and Seller [US Mag] dated April 12, 2006 [i.e., the Exclusivity Agreement] (the "April 12, 2006 Agreement") is in no way merged into, modified by, or canceled by this Agreement, and that ***the April 12, 2006 [Exclusivity] Agreement, including, without limitation, Section 5 thereof, survives in full force and effect.***

(*Id.* at ¶ 12.5 (emphasis added).)

33. On December 27, 2006, ATI officer Douglas Kittenbrink, nominally on behalf of ATI-Ti, entered into an Agreement for the Development of Land ("ADL") with the Redevelopment Agency of Tooele County ("RDA"), to establish and develop the North Rowley Economic Development Project Area ("North Rowley EDP"). (*See* Cowart Decl., ¶¶ 14, 26-29, Exs. 8, 11, 16 thereto.)

34. Under the terms of the ADL, ATI-Ti agreed to develop and build its titanium sponge with the uses specified in the ADL and Economic Development Plan adopted by Tooele County. (*See* Cowart Decl., ¶ 27, Ex. 16 thereto.)

35. As reported by the *Tooele Transcript Bulletin* on Wednesday, on May 30, 2007, ATI held a groundbreaking ceremony to commemorate the beginning of the ATI Plant's construction. In attendance was ATI's CEO Hassey, who stated that "This [Rowley Plant] will be the keystone plant for us and we will be around for many, many years." (*See* Cowart Decl., ¶¶ 31-33, Ex. 17 thereto.) Also in attendance at the ATI Plant ground-breaking ceremony was then Utah State Governor Jon M. Huntsman, Jr. (*Id.*)

ATI-Ti Operates as a Mere Instrumentality of ATI.

36. Since 2006, ATI-Ti's managers have always been appointed from among ATI's executive officers; and such executive officers have continued to hold their positions with ATI despite *concurrent* appointment as managers of ATI-Ti. (Cowart Decl., ¶¶ 4-7, 11, 12-13.)

37. In company newsletters, ATI held itself out as one and the same with ATI-Ti. For example, in ATI's summer/fall newsletter from 2008, ATI stated, "Our greenfield premium sponge facility in Utah is expected to begin initial production by the end of the first quarter 2009." (Cowart Decl., ¶ 37, Ex. 21 thereto, p. 4.) Later in the newsletter, there is a photograph of Jason Perry, executive director of the Utah Governor's Office of Economic Development, presenting ATI executive Lynn Davis with the Community Impact Award "in recognition of the future impact ATI will have on the workforce and community economic development in Utah." (*Id.,* p. 5.) That same newsletter included a full-page note from the state of Utah to ATI, stating: "The State of Utah thanks Proctor & Gamble and [ATI] for choosing to build major new projects in our state . . . ." (*Id.,* p. 2.)

38. In 2010, ATI's SEC filings reference "start-up costs" for "our Rowley, UT premium titanium sponge facility." They go on to state, "We plan to ramp production at this new facility throughout 2010 in a systematic manner." (Cowart Decl., ¶ 38, Ex. 22 thereto.)

39. A 2012 press release boasts that ATI has completed the standard-grade qualification for the Rowley facility, stating, "This is an important accomplishment as we continue the process of achieving our strategic goal of a cost-effective premium titanium sponge facility." (Cowart Decl., ¶ 39, Ex. 23 thereto.)

40. Throughout ATI-Ti's relationship with US Mag, when US Mag needed to address high-level operational concerns regarding the ATI plant, US Mag communicated directly with Lynn Davis of ATI, rather than with any officer or employee located at the Utah facility. Lynn Davis would then make arrangements to address those operational concerns. On several

occasions, Mr. Davis traveled directly to Utah to address concerns or implement changes as necessary. (Tissington Decl., ¶¶ 3, 11-12.)

41. The signage on the ATI-Ti Rowley plant prominently features the ATI logo. (See Cowart Decl., ¶ 51, Ex. 31 thereto.)

42. ATI-Ti provided titanium products only to ATI. (Tissington Decl., ¶ 11.)

ATI Makes the Call to Idle ATI-Ti's Rowley Facility, Causing ATI-Ti to Breach its Contract with US Mag

43. As alleged in the Complaint, Section 9.1 of the Supply Agreement provides that it has a term of twenty (20) years. Pursuant to Article 1 of the Agreement, "Commercial Operations" commenced when the Titanium Sponge Plant produced titanium sponge conforming to the specifications in schedule 1.1(a) for three consecutive calendar months at an annualized rate of at least twelve million (12,000,000) pounds per year. The effective date of the Agreement corresponded to the commencement of "Commercial Operations" which was July 2011. The term of the Agreement therefore extended through and including 2031. (Compl., ¶ 14.)

44. Section 11.2 of the Supply Agreement provides that an "Economic Force Majeure" occurs "[i]f Buyer [*i.e.*, ATI-Ti] obtains a bona fide, good faith and arm's length written contract offer or offers from another supplier or other suppliers of titanium sponge for the sale to Buyer of a supply of titanium sponge of like grade, quantity and quality to that being produced at the Titanium Sponge Plant and such written contract offer(s) would result in Buyer's obtaining titanium sponge for a period of at least five (5) consecutive years at a price DDP to any facilities of Buyer, ATI, or any of their respective Affiliates at or below eighty-five percent (85%) of its variable costs to produce titanium sponge at the Titanium Sponge Plant." (Compl., ¶ 15.)

45. Section 11.2 of the Supply Agreement also provides that if an Economic Force Majeure occurs, "Buyer may suspend its performance under this Agreement, including, without limitation, its purchase of Magnesium under this Agreement, upon at least one hundred eighty (180) days' prior written notice to Seller (the "Economic Force Majeure Notice"); provided, however, that Buyer and Seller will enter into good faith negotiations during such one hundred eighty (180)-day period to attempt to negotiate revised pricing for Magnesium under Schedule 2.1 of this Agreement." (Compl., ¶ 16 (emphasis added).)

46. This negotiation requirement was intended to provide a means by which the parties could potentially avert an Economic Force Majeure and continue performance under the Agreement. In this regard, Section 11.2 of the Agreement provides, in pertinent part, as follows:

> If the parties mutually agree upon such revised pricing in writing during the one hundred eighty (180)-day period, the Economic Force Majeure will be averted and deemed rescinded, and the parties will continue to perform their respective obligations under this Agreement, subject to, the revised pricing schedule. If the parties do not agree upon revised pricing during such one hundred eighty (180)-day period, Buyer will suspend its performance hereunder upon the expiration of such period and all remaining Magnesium reserved for Buyer at the time of such suspension of performance under the then applicable annual forecast shall, to the extent not already purchased by Buyer, be deemed immediately released by Buyer, and Seller shall have the right to sell such Magnesium to third parties without further notice to or approval from Buyer, and Buyer shall have no further obligations with respect to such Magnesium . . . .

(Compl., ¶ 17.)

47. Even if the parties' negotiations to avert the Economic Force Majeure proved unsuccessful, Section 11.2 guaranteed Plaintiff that ATI-Ti would continue to perform its obligations under the Agreement, including its obligations to purchase magnesium from Plaintiff and to supply magnesium chloride to Plaintiff, for a minimum of 180 days. (Compl., ¶ 18.)

48. Further, Section 11.3 of the Agreement provides Plaintiff the right to an independent audit to verify the legitimacy of an asserted Economic Force Majeure. Section 11.3 provides, in pertinent part, as follows:

> Section 11.3 Audit Right for Economic Force Majeure. If Buyer provides an Economic Force Majeure Notice to Seller, Seller shall have the right to engage a mutually acceptable independent accounting firm to audit Buyer's records providing evidence of the Economic Force Majeure during the one hundred eighty (180) day period from Buyer's provision of the Economic Force Majeure Notice to Seller until the date of its suspension of performance under this Agreement. . . . Seller will notify Buyer in writing of the audit at least ten (10) calendar days before the commencement of the audit. The accounting firm may audit any and all records pertaining to the calculation of the declared Economic Force Majeure at Buyer's facility where they are located, provided that such audit will be conducted during normal business hours and in such a manner as to minimize any disruption to the normal business operations of Buyer. Buyer will cooperate with the accounting firm and its representatives in finding and compiling records for the audit, and in the answering of questions and the providing of information for the audit. Within ninety (90) days of its engagement and in no event later than the expiration of one hundred eighty (180) days from Buyer's provision of the Economic Force Majeure Notice to Seller, such accounting firm will provide a written opinion to the parties determining whether or not the requirements of an Economic Force Majeure have been met, and the Parties thereafter will be bound by the accounting firm's determination of whether or not those requirements have been met. If the requirements for an Economic Force Majeure have been met, Buyer may suspend its performance of this Agreement upon the expiration of one hundred eighty (180) days from the date of the Economic Force Majeure Notice as set forth in Section 11.2 of this Agreement. If the requirements for an Economic Force Majeure have not been met, Buyer will be required to continue to perform its obligations under this Agreement. . . .

(Compl., ¶ 19.)

49. By letter dated August 23, 2016, ATI-Ti purported to provide Plaintiff notice that ATI-Ti was declaring an "Economic Force Majeure" pursuant to Section 11.2 of the Agreement. In the same letter, ATI-Ti stated that it "will be suspending its performance under the Agreement one hundred eighty (180) days following this letter." (Compl., ¶ 20.)

50. On August 24, 2016, ATI filed an 8k with the SEC that included an announcement of the indefinite idling of the Rowley, Utah titanium sponge production facility. (Cowart Decl., ¶ 42.) The press release further stated, "These action are expected to improve ATI's annual operating income by approximately $50 million beginning in 2017 and generate approximately $50 million of cash flow from lower managed working capital." (*See* Cowart Decl., ¶ 42, Exs. 25, 26 thereto.)

51. The August press release also explained, "This disciplined process is a key part of our [ATI's] commitment to make the tough decisions that are required to strengthen and enhance ATI's ability to deliver sustainable profitable growth, and create value for our customer and our shareholders over the long-term." *Id.*

52. In contravention of its written statement, and in breach of the Supply Agreement, at a meeting on or about August 30, 2016, ATI-Ti provided Plaintiff a unilateral ramp down schedule reflecting that ATI-Ti intended to close down the operations of the Titanium Sponge Plant as soon as it exhausted its inventory of a raw material (titanium tetrachloride), which was expected to occur in a few weeks after said meeting. (Compl., ¶ 21.)

53. On October 25, 2016, ATI conducted a "Q3 2016 Earnings Call" and discussed its third-quarter results. During a question-and-answer session, analyst Richard T. Safran asked ATI's CEO and Chairman of the Board, Richard Harshman, "Rich, I wanted to know if you could go into on the topic of Rowley. After spending $1 billion, I wanted to know if you could go into a little bit about the rationale for shutting the facility after that large investment. Can you go into a bit on the dynamics that changed such that you're now going to buy sponge externally?" Harshman explained that there were two primary reasons for ATI's decision to idle

the Rowley plant: (1) When the Rowley facility was created, a major purchaser, Boeing, had been demanding integrated suppliers capable of producing titanium sponge in the United States; and (2) world-wide markets did not offer necessary capacity. In this regard, Harshman stated:

> Yes. And we did spend a lot of money on Rowley, but thankfully it wasn't a $1 billion. It was $500 million, but needless to say that's a big number. When that investment decision was made, the world was a lot different place, right. . . .
>
> . . .
>
> . . . [T]oday because of the excess supply of titanium sponge in the world, ***we're able to enter into long-term price supply agreements with our suppliers that we weren't able to answer [sic] into in 2006 and 2007.*** And quite frankly, until here just recently. ***The dynamics are such that the marketplace is a lot different.***
>
> Our cost of producing sponge in Rowley even if we were to produce it at the full rated capacity is significantly higher than our cost of acquiring the titanium raw material units, either as sponge or scrap. ***And when you do the math and the fact that it was costing us, and we've been disclosing this consistently, costing us between $40 million and $50 million a year of a margin compression on those products to continue to run Rowley, it's no longer something that is tenable, and we made the decision that we announced in August.*** So different market conditions and different fact circumstances from a lot of different aspects, and we move on.

(*See* Cowart Decl., ¶ 47, Ex. 28 thereto (emphasis added).)

ARGUMENT

To defeat a motion to dismiss under Rule 12(b)(2), a plaintiff need only make a prima facie showing of personal jurisdiction. *OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1090 (10th Cir. 1998). This is a "light" burden. *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000); *Luc v. Krause–Werk*, 289 F. Supp.2d 1282, 1286 (D. Kan. 2003). In determining whether a plaintiff has met this burden, the Court must accept as true any factual allegations which are not specifically controverted with evidence. *Miner v. Rubin & Forella, LLC*, 242 F. Supp.2d 1043, 1045 (D. Utah 2003); *Universal Leather,* *LLC v. Koro AR, S.A.*, 773 F.3d 553, 558 (4th Cir. 2014). Moreover, those allegations and any inferences therefrom must be viewed in the light most favorable to plaintiff. *Id.* "When conflicting affidavits are presented, factual disputes are resolved in plaintiff's favor...." *Behagen v. Amateur Basketball Ass'n of U.S.A.*, 744 F.2d 731, 733 (10th Cir. 1984); *see also Universal Leather*, 773 F.3d at 560 (stating that if a court does not "conduct an evidentiary hearing, the court [is] required to assume the credibility of [Plaintiff's] version of the facts, and to construe any conflicting facts in the parties' affidavits and declarations in the light most favorable to [jurisdiction].") Finally, a "complaint should not be dismissed for want of jurisdiction, before trial, if there is any genuine issue as to any fact material to the jurisdictional question." *Radaszewski v. Telecom Corp.,* 961 F.2d 305, 309 (8th Cir. 1992).

Here, Plaintiff need not establish a prima facie case of general jurisdiction over ATI, because the Complaint alleges more than enough to show that specific jurisdiction is proper.

A. ATI'S ACTIVITIES SUBJECT THE COMPANY TO SPECIFIC JURISDICTION IN UTAH.

Specific jurisdiction requires that a defendant have sufficient minimum contacts with the forum state, and jurisdiction over the defendant cannot offend "traditional notions of fair play and substantial justice." *Intl. Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Establishment of minimum contacts requires a showing that the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State[.]" *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Where a defendant has created continuing obligations between itself and a resident of the forum, or where it has availed itself of the "benefits and protections of the forum's laws," it is not unreasonable to require that defendant to submit to the burdens of litigation in the forum. *Burger King Corp. v. Rudzewicz*, 471 US 462, 475-76 (1985).

The U.S. Supreme Court has held that on the matter of minimum contacts based on a contractual breach, a court must consider not just the contract itself, but "prior negotiations and contemplated future consequences." *Id.* at 479. And, "even a single act" can support jurisdiction so long as it creates a substantial connection with the forum, and the alleged injuries "arise out of or relate to those activities." *Id.* at 472, 475 n.18. Further, the Supreme Court has recognized that when wrongful conduct is "expressly aimed at [a forum state]," and where the defendants "knew that the brunt of that injury would be felt by respondent in the State in which [it] [resides] and works," then the defendants "must reasonably anticipate being haled into court there." *Calder v. Jones*, 465 U.S. 783, 789-90 (1984); *see also Pohl, Inc. v. Webelhuth*, 201 P.3d 944 (Utah 2008) (applying *Calder* "effects" test). Under the controlling standard, and as shown below, ATI easily had sufficient contacts to support jurisdiction – both through its own direct activities, and through its Utah-based agent and alter-ego subsidiary, ATI-Titanium, LLC ("ATI-Ti").

1. ATI's Own Direct Contacts Subject it to Jurisdiction in Utah.

First, ATI's own contacts with Utah were substantial. As alleged in the Complaint, the managers of ATI-Ti are all directors, officers, or in-house counsel of ATI, who manage ATI-Ti in the interest of ATI; and ATI holds itself out as owning and controlling the Rowley Titanium Sponge Plant. ATI does not dispute these allegations. Nor does it dispute that it "makes business decisions for ATI-Ti," and that it recently made the decision idle the ATI Plant – *i.e.*, engaging in wrongful conduct, knowing that the injury would be suffered in Utah. By this oversight and control, and by holding itself out as the face of a Utah corporation, ATI cannot claim to be surprised at being haled into Court here.

Although the Complaint follows notice pleading standards[3] and therefore does not set forth the full history of ATI's relationship with ATI-Ti and US Mag, those relationships are further explained in the declaration submitted by US Mag's Vice President of Sales, Cameron Tissington, and as shown by the exhibits attached to the Declaration of Amanda Cowart, and they merit some discussion here. Many months before the ATI-Ti and US Mag executed the Supply Agreement, it was *ATI* that initiated and engaged in extensive negotiations regarding its potential Utah operations – and not just negotiations with US Mag, but also with the County of Tooele and State of Utah. Officers and executives *of ATI* made several trips to Utah, and managed to secure various incentives for their anticipated titanium production facility – persuading Tooele County, for example, to create a special economic development district covering the site on which *ATI* planned to build its facility (*see* SOF ¶¶ 20, 29); and persuading the Utah Governor's Board of Economic Development to offer millions in tax incentives in exchange for *ATI*'s promise to bring jobs to Utah and make long-term capital investments (SOF ¶¶ 17-18). Thus, ATI not only availed itself of the benefits and protections of Utah laws, but even *fostered the creation of new laws* for its own advantage. While all these negotiations and deal-makings continued, *ATI-Ti did not exist.*

In January, 2006, ***ATI*** and US Mag entered into a Confidentiality Agreement – which remained binding for ten years following the latest disclosure. Then, in April, 2006, ***ATI*** and US Mag entered into another agreement, the Exclusivity Agreement, by which ***ATI*** promised to further explore the feasibility of constructing its titanium facility on what was then US Mag

[3] "A pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8 (a).

property in Tooele County. In exchange, US Mag promised to propose terms and conditions for the US Mag's ***and ATI's*** long-term relationship with respect to that Tooele County property and the related exchange of goods. ***ATI*** would then have the "option of accepting the original or modified proposals and entering into final agreement(s) with US Mag in order to complete ***ATI's*** Titanium Sponge Plant[.]" (*See* Tissington Decl., Ex 2 thereto, ¶ 2 (emphasis added).) Importantly, by the terms of the Exclusivity Agreement, if ***ATI*** built a titanium sponge plant in Tooele County as anticipated, then US Mag promised that, for the next twenty years, it would "supply molten magnesium for titanium sponge exclusively to ***ATI.***" (*Id.* at ¶ 5 (emphasis added).) Although not specifically called out in the Complaint, that Exclusivity Agreement is expressly incorporated into the Supply Agreement which is attached to the Complaint, and which is the focal point of this suit. (*See* SOF ¶ 26.) And, the Exclusivity Agreement *was drafted to remain binding on US Mag* ***and ATI*** *until April of 2026.* (*See* SOF ¶¶ 10, 14.)[4]

It was not until August 31, 2006, that ATI's brand-new subsidiary, ATI-Ti, became licensed to do business in the State of Utah. (*See* SOF ¶ 21.) The very next day, Patrick Hassey, who was ***ATI***'s Chairman and CEO, and who had a residence in Salt Lake City, but who held no discernable position with the new subsidiary, signed the Supply Agreement with US Mag. (*See* SOF ¶ 23.)

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[4] Although the Complaint does not specifically allege any breach of the Exclusivity Agreement, its terms are put at issue by ATI's and ATI-Ti's failure to purchase magnesium from US Mag. In this regard, section 5 provides:

> In the event ATI agrees to build the Titanium Sponge Plant on USMAG's Adjacent Property, the exclusivity would last for a period of at least twenty years, and USMAG would supply molten magnesium for titanium sponge exclusively to ATI; provided, however, ***that in the event ATI fails to purchase a minimum of 5,000 TPY of magnesium from USMAG for two consecutive calendar years, or in the alternative fails to reasonably offer to compensate USMAG for such failure, USMAG would have the right to terminate the foregoing exclusivity provision.***

ATI and ATI-Ti have, in fact, represented that they will idle the Rowley plant indefinitely. By the Exclusivity Agreement alone (to say nothing of the Supply Agreement), ATI must "reasonably offer to compensate" for that failure; and, if it does not do so, US Mag's exclusivity obligations will become at issue in this suit.

Thus, all along, it was ***ATI*** that planned, negotiated, made promises, secured agreements, and conducted operations with respect to the titanium production facility in Tooele. After many months of negotiations, law-making, and contracting in Utah, ATI's establishment of a agent (*i.e.*, dummy) subsidiary, a single day before the subsidiary entered into the subject Supply Agreement, cannot be grounds for ATI to escape personal jurisdiction in the forum – particularly where *ATI* has executed an agreement with US Mag that was drafted to remain in effect until 2016, and where the matters at issue in this suit are closely related to the commitments made in that agreement.

The above facts show that *ATI itself* had such minimum contacts as would readily support jurisdiction. This court, and other courts, have found personal jurisdiction with facts far less compelling.[5]

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[5] *E.g. Basic Research, LLC v. BDirect, Inc.*, No. 2:06–CV–932 TS, 2007 WL 2254691, *3 (D. Utah Aug. 2, 2007) (unpublished) (company president subject to personal jurisdiction in Utah where he traveled to Utah "pursuant to the negotiations of the contractual relationship subsequently entered into between [defendant's company] and [plaintiff], and at least one of the contracts at issue contained a Utah choice of law provision); *3Form, Inc. v. Sunset Plaza, LLC,* No. 2:10–CV–856 TS, 2011 WL 761238, *3 (D. Utah Feb. 24, 2011) (unpublished) (finding personal jurisdiction where defendants "entered into a contract with Plaintiff in Utah for the purchase of a product manufactured in and shipped from Utah," despite defendants' argument that they had never had a physical presence in Utah and the construction project at issue was located in California); *Synergetics By and Through Lancer Industries, Inc. v. Marathon Ranching Co.*, Ltd., 701 P.2d 1106, 1108 (Utah 1985) (negotiation, drafting, and signing of a single modified contract in Utah constituted the transaction of business sufficient to support jurisdiction); *see also A.W. Fiur Co., Inc. v. Ataka & Co., Ltd.*, 71 A.D.2d 370 (N.Y. App. Div. 1979) (overturning summary judgment for defendant Japanese corporation, where cause of action was for breach of subsidiary's contract, and where parent had negotiated and agreed upon

2. By Virtue of Its Agency/Alter Ego Relationship with ATI-Ti, ATI Had Additional Regular, Sustained Contacts With Utah.

Next, on account of ATI's agency and alter ego relationship with is subsidiary, ATI had additional, regular, and systematic contacts with the state.

ATI does not dispute that its subsidiary ATI-Ti "resides in and/or does business in Utah such that ATI-Ti (a) has continuous and systematic contacts with Utah and/or (b) has the requisite minimum contacts with Utah in relation to the cause(s) of action alleged herein." The agency and alter ego allegations of the Complaint are sufficient that these contacts of ATI-Ti may be imputed to ATI for jurisdictional purposes. *See* Utah Code Ann. § 78B-3-202 (providing that for purposes of long-arm jursidction, "the words 'transaction of business within this state' mean activities of a nonresident person, his agents, or representatives in this state which affect persons or businesses within the state"); *Taylor v. Phelan*, 912 F.2d 429, 433 (10th Cir. 1990) ("[I]t is well-established that a principal may be subject to the jurisdiction of the court because of the activities of its agent within the forum state."); *Curtis Publishing Co. v. Cassel*, 302 F.2d 132, 137 (10th Cir. 1962) ("[A] wholly owned subsidiary may be an agent, and when its activities as an agent are of such a character as to amount to doing business of the parent, the

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terms to the contract, but parent had a dummy subsidiary execute contract in America because of Japanese currency laws and American tax laws); *Combined Logistics, (U.S.A.), Inc. v. Stonkus*, No. 96CV-0949(NG), 1997 Wl 778781 (E.D.N.Y. Dec. 15, 1997) (unpublished) (parent's participation/initiation of contract supported personal jurisdiction in forum, despite the fact that parent did not sign the subject agreement)*; Richard Knorr Intern., Ltd. v. Geostar, Inc.*, No. 08-C-5414, 2010 WL 1325641 (N.D. Ill. Mar. 30, 2010) (unpublished) (finding personal jurisdiction over parent company, observing that "Geostar formed the Operating Companies [subsidiaries] for the sole purpose of carrying out a development opportunity that Geostar had selected and that Geostar had chosen to pursue. … Far from being a series of freestanding businesses that Geostar just happens to own, the subsidiary companies are nothing but Geostar's attempts to cabin off various aspects of its own business venture for legal and financial purposes.")

parent is subjected to the in personam jurisdiction of the state in which the activities occurred."); *White Family Harmony Inv., Ltd. v. Transwestern West Valley, LLC,* No. 2:05-CV-495-DAK, 2005 WL 2893784, *7 (D. Utah Oct. 31, 2005) (unpublished) (agreeing with plaintiff that "courts consistently impute an alter ego subsidiary's contacts to the parent corporation").

ATI cites several cases for the proposition that a parent cannot be subject to jurisdiction merely on account of its subsidiary's contacts with the forum. Those cases are unavailing on multiple grounds. One case is cited only for *dicta*, and the holding itself does not help Defendant's position.[6] The other cases involve simple parent-subsidiary relationships, with no allegations or evidence of the parent having negotiated the agreement in dispute; nor of the parent having actively sought the benefits and protections of the forum's laws through tax incentives and special tax districts; nor of the parent entering into contracts with the plaintiff.[7]

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[6] In *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 781 n.13 (1984), the Supreme Court stated in dicta that a parent/subsidiary relationship alone does not "automatically" support jurisdiction, but noted that in that case, the Court of Appeals had never inquired into the propriety of jurisdiction over the parent. On remand, the Court left open the question of jursidction over the parent, counseling that jurisdiction should rest on an individualized assessment of the parent's contacts.

[7] *See Benton v. Cameco Corp.*, 375 F.3d 1070 (10th Cir. 2004) (no allegations or evidence of alter ego or agency relationship with subsidiary; no alleged direct contacts between parent and forum); *Associated Electric and Gas Ins. Serv. Ltd. v. American Intern. Group, Inc.,* No. 2:11-CV-368-DAK, 2012 WL 256146 (D. Utah Jan. 27, 2012) (unpublished) (no evidence or allegation that parent had engaged in substantial negotiations in forum, signed contracts in forum with plaintiff, secured tax incentives, promoted new tax districts, or participated in subsidiary's decision to breach contract with plaintiff); *Tigerstripe Paintball, LLC v. Heckler & Koch, Inc.,* No. 1:09-CV-57-TC, 2010 WL 414471 (Jan. 28, 2010) (unpublished) (parent company had absolutely no contacts with forum, and there were no alter ego or agency allegations); *Litster v. Alza Corp.*, No. 2:05-CV-1077- TS, 2006 WL 3327906 (Nov. 15, 2000) (unpublished) (no alter ego or agency allegations; allegations involving parent's deliberate distributions of its products into the forum were contradicted by defense affidavit, and plaintiff produced no other evidence to suggest that jurisdictional discovery might be fruitful); *American Eyewear, Inc. v. Peeper's Sunglasses,* 106 F. Supp.2d 895 (N.D. Tex. 2000) (simple parent/subsidiary relationship with no allegations that parent itself engaged in contact with forum or induced subsidiary's breach of contract); *Matosantos Commercial Co. v. Applebee's Intl., Inc.,* 2 F. Supp.2d 191 (D.P.R. 1998)

ATI also cites several cases for the proposition that it cannot be held liable for a breach of contract by its subsidiary. Notably, none of these cases addressed the matter of personal jurisdiction; the fact that these courts even reached the merits of the claims strongly suggests that personal jurisdiction over the parent company was held to be proper. But even as to the merits of Plaintiff's claims, these cases do not help ATI. One case involves law that is now obsolete.[8] Two cases embrace the veil-piercing theory but reject its application under factual circumstances that are nothing like the facts at issue here.[9] The few foreign cases that reject a cause of action on theoretical grounds – *i.e.*, the parent company's so-called "privilege" to tortiously interfere with its subsidiary's contracts – are likewise inapt. ATI cites no Utah law endorsing this "privilege." Further, a claim for "tortious interference" must involve some wrongful meddling with a *third-party's* contract, and those courts that have rejected the tortious interference theory in a parent-subsidiary relationship have done so *because they deem a parent corporation not to*

("[P]laintiff has not alleged that Gournet Systems [subsidiary] was directly or indirectly controlled by Applebee's International[.]").

[8] In *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1577 (10th Cir. 1990), the question before the Court was whether it was proper, under a "reverse piercing" theory, for the lower court to hold an entity accountable based on the wrongful conduct of the entity's controlling shareholder. The Tenth Circuit overturned a verdict for plaintiff, finding the reverse-piercing theory unsupportable under Utah law. However, the Utah Supreme Court later specifically endorsed the reverse-piercing theory, thus undermining the holding of *Cascade*. *See M.J. v. Wisan*, 2016 UT 13, ¶ 77, 371 P.3d 21.

[9] In *Centurian Corp. v. Fiberchem, Inc.*, 562 P.2d 1252 (Utah 1977), one company's funds had been inadvertently applied to another company's debt. The question was whether such cross-application of funds was proper merely because the same man had interest in both companies. There were no allegations of any connection between the two companies, other than common ownership. Next, in *Dockstader v. Walker*, 510 P.2d 526 (Utah 1973), the Court declined to pierce a corporate veil to hold an individual shareholder responsible for an entity's breach of employment contract, where the individual did not even own a majority of the stock and, in firing the plaintiff, he had acted pursuant to a decision by the board of directors).

be a third party, but instead to be "at least an indirect party to the contract."[10] Such "unity of interest" itself is what has been held to defeat a cause of action based in tort. That line of cases does not help Defendant here, where Plaintiff has *not* alleged tortious interference, but instead specifically alleges that parent and subsidiary had a unity of interest through an alter ego or agency relationship. Contrary to Defendant's suggestion, courts have no trouble holding a parent (or other stockholder) liable for a subsidiary's breach of contract. *E.g., Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42 (Utah Ct. App. 1988) (issues of fact precluded summary judgment on alter ego claim against parent corporation, in case involving subsidiary's breach of contract); *see also United Vaccines, Inc. v. Diamond Animal Health, Inc.,* 409 F. Supp. 2d 1083 (W.D. Wis. 2006) (allegations as to parent corporation's exertion of control over subsidiary with respect to management, business activities and operations with customers were sufficient to state claim against the parent based on subsidiary's alleged breach of contract and breach of warranty); *Knight Brother, LLC v. Barer Engineering Co. of America*, No. 2:10-CV-108-TS, 2011 WL 237153 (D. Utah Jan. 24, 2011) (unpublished) (in breach of contract case against corporation, finding personal jurisdiction over corporation's individual owner under alter ego theory).

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[10] In *Boulevard Associates v. Sovereign Hotels, Inc.*, 72 F.3d 1029 (2d Cir. 1995), the Second Circuit addressed whether a parent could be held liable for tortiously interfering with its subsidiary's contract, where the parent had directed the failing subsidiary hotel to discontinue lease payments. The court rejected the "tortious interference" theory because the parent was deemed to be "at least an indirect party to the contract," and that unity of interest was held contrary to the "tortious interference" cause of action. *Id.* at 1036. Even there, the Second Circuit stated, "We do not hold that a sole shareholder is privileged to employ any means, no matter how improper,to induce a breach of contract involving its own company." *Id.* at 1037 (emphasis in original). In ATI's other case, *HSK v. Provident Life & Accident Ins. Co.*, 128 F. Supp.3d 874 (D. Md. 2015), again the court declined to find tortious interference with a subsidiary's contract, but only because of the "significant unity of interest between a corporation and its sole shareholder." This "unity of interest" theory is eminently consistent with Plaintiff's alter ego allegations against ATI in this case.

In sum, whether the Court relies on an alter-ego/agency analysis, or looks solely to ATI's own forum-related activities, ATI's numerous and very substantial contacts with Utah cannot be said to have arisen fortuitiously or by virtue of "actions taken by someone else." (*See* ATI MTD at p. 14.) *ATI itself* was the actor who instigated and carried out business dealings in Utah – whether on its own or through ATI-Ti. And, ATI's ongoing control over ATI-Ti, and in particular its decision to have ATI-Ti breach the Supply Agreement, constituted purposeful activity directed at the forum state and certain to cause injury there. The "minimum contacts" requirement is satisfied.

B. FAIR PLAY AND SUBSTANTIAL JUSTICE ALSO SUPPORT JURISDICTION.

As discussed above, the second step of a jurisdictional analysis requires a Court to consider whether the assertion of jurisdiction would comport with "fair play" and "substantial justice." *See Intl. Shoe Co.*, 326 U.S. at 316. In making the "fair play" determination, courts look to the following factors: "(1) the burden on the defendant; (2) the forum state's interest in resolving the dispute; (3) the plaintiff's interest in receiving convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive policies." *See Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244, 1249 (10th Cir. 2000). ATI does not argue that any of these factors weigh in its favor. None of them do.

First, the burden on the defendant, if forced to litigate in Utah, would be slight. ATI is a large international company that is accustomed to doing business all over the world. *See Springfield Finance & Mortg. Co., LLC v. Lilley*, No. 2:14–CV–00679–EJF, 2015 WL 5703913, *6 (D. Utah Sep. 28, 2015) (unpublished) ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.") (quoting *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987)). As set forth in Plaintiff's Statement of Facts, ATI's executives have made numerous trips to Utah, to secure the benefits of doing business here. Therefore, they should not be heard to complain of being haled into court in Salt Lake City.

Second, Utah has a compelling interest in providing a forum for this dispute, where ATI induced the County of Tooele and the Utah Governor's Board of Economic Development to approve new laws and millions of dollars in tax incentives on ATI's representation that it would bring long-term capital investments to the state; where ATI-Ti's breach of contract, induced by ATI, caused a Utah corporation to suffer tens of millions of dollars in losses; where the breach and subsequent plant closure caused many Utah individuals to lose their jobs; and where ATI and ATI-Ti, in negotiating and executing the Supply Agreement, agreed that Utah law would govern any contract disputes.

Third, Plaintiff's interests weigh in favor of keeping the litigation local, because Plaintiff is a Utah-based company, with all of its officers, executives, and employees in Utah, and litigating in another state would present at least the same inconveniences to Plaintiff that litigating in Utah might present to ATI. *See Springfield Finance*, *supra*, 2015 WL 5703913, at *6 ("Springfield has its base in Utah, and litigating in Florida would present the same inconveniences to Springfield that litigating in Utah presents to Ms. Lilley. Thus this factor weighs in favor of jurisdiction.").

Fourth, efficiency supports jurisdiction in Utah, because much of the documentary evidence, and all of US Mag's witnesses, are in Utah.

The final "reasonableness" factor requires the Court to evaluate any other state's interest in resolving the dispute, relative to Utah's position. *See id.* at *6 (D. Utah Sep. 28, 2015). (unpublished). ATI has not articulated what interest Delaware, Pennsylvania, Oregon, or any other state, may have in providing a forum for this dispute. The case is entirely centered in Utah, involves Utah-based companies, Utah-based commitments, and Utah injuries; and Utah law governs. This factor also weighs heavily in favor of jurisdiction.

In all, the exercise of jurisdiction over ATI would not remotely offend traditional notions of fair play and substantial justice. The requirements for personal jurisidiction are satisfied. Defendants' Rule 12(b)(2) motion should be denied.

C. PLAINTIFF HAS SUFFICIENTLY PLED AN ALTER EGO CLAIM.

ATI next argues that Plaintiff's alter ego claim is inadequately pled.[11] This argument, too, is flawed and should be rejected.

Under Rule 12(b)(6), the moving party bears the burden of proving that no legally cognizable claim for relief exists. *See* Wright & Miller, Federal Practice and Procedure: Civil 3d, Section 1357. A complaint must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8 (a). While Plaintiff must provide enough facts to state a claim to relief that is plausible on its face, and to "raise a right to relief above the speculative level, *see Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 570 (2007), courts do not require a "heightened fact pleading of specifics." *Id.* at 570. In considering a motion to dismiss under rule 12(b)(6), the court "accept[s] all well-pleaded facts as

[11] ATI appears to agree that Plaintiff has sufficiently stated a claim for ATI's liability based on its principal/agent relationship with ATI-Ti.

true and view[s] them in the light most favorable to the plaintiff" *Jordan–Arapahoe, LLP v. Bd. of County Comm'rs*, 633 F.3d 1022, 1025 (10th Cir. 2011).

As with a motion under Rule 12(b)(2), unless the allegations of the Complaint are specifically controverted, they must be taken as true; and all disputes of fact, and the inferences therefrom, must be construed in Plaintiff's favor. *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir.1976). A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381 (10th Cir. 1997).

These rules apply to alter ego claims just as they would apply to any other claims not subject to a heightened pleading standard. *See, e.g., Knight Bro., LLC v. Barer Engineering Co. of America*, No. 2:10–CV–108-TS, 2011 WL 237153, *1 (D. Utah Jan. 24, 2011) (unpublished) (denying motion to dismiss alter ego claims, despite arguments that claims, as pled, were conclusory); *accord Bigpayout, LLC v. Mantex Enterprises, Ltd.*, No. 2:12–CV–01183–RJS, 2014 WL 5149301, *8 (D. Utah Oct. 14, 2014) (unpublished) (denying motion to dismiss alter ego claim, stating that "[t]he Complaint provides a plausible basis for concluding that a unity of interests existed between Mr. Soares and Mantex. For example, Mr. Soares represented himself as the owner of Mantex, negotiated on Mantex's behalf, entered into agreements on the company's behalf, purportedly exercised control over the company, and promised to personally cover Mantex's outstanding obligations.").[12]

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[12] *See also Digital Advertising Displays, Inc. v. Sherwood Partners, LLC*, No. 12–CV–00682–WJM–MEH, 2013 WL 2149467, at *3 (D. Colo. May 16, 2013) (unpublished) (denying Rule 12(b)(6) motion to dismiss alter ego claims, where plaintiff had pleaded that "at all times [the individual defendant] made all decisions and was responsible for the disposition of all assets formally owned by Reactrix that were assigned to Reactrix ABC"). *H.C. Duke & Son, LLC v.*

On a Rule 12(b)(6) motion, unlike with a motion to dismiss on jurisdictional grounds, the Court must examine only the Complaint. *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). "When a defendant files a motion under both Rule 12(b)(2) *and* Rule 12(b)(6), the court may consider extra-pleading material when determining whether it has personal jurisdiction over defendants but exclude the same evidence from consideration of whether the complaint states a claim, even when the two questions turn on the same issue." *Stewart v. Screen Gems-EMI Music, Inc.*, 81 F. Supp.3d 938, 951 (N.D. Cal. 2015); *see also TFG - New Jersey, L.P. v. Mantiff Jackson Nat. Hospitality LLC*, No. 2:08–CV–361-TS, 2008 WL 4755769, *1 (D. Utah Oct. 28, 2008) (unpublished) (observing that court may consider extrinsic evidence on Rule 12(b)(2) motion without converting it to summary judgment, and distinguishing that scenario from a 12(b)(6) motion). If the Court elects to consider extrinsic evidence on the Rule 12(b)(6) motion, it must then convert the motion to one for summary judgment. *Burnham v. Humphry Hospitality Reit Trust, Inc.*, 403 F.3d 709, 713 (10th Cir. 2005). However, under such circumstances, the parties must "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

Prism Marketing Corp., No. 4:11–CV–04006–SLD–JAG, 2012 WL 2792443, *3 (C.D. Ill. Jul. 9, 2012) (unpublished) (finding alter ego allegations sufficient to withstand motion to dismiss, where plaintiff had alleged "there is such a unity of interest and ownership between Defendants Prism and Superior such that any individuality and separateness between them have ceased"); *In re Ski Train Fire In Kaprun, Austria on Nov. 11, 2000*, 257 F.Supp.2d 717, 736 (S.D.N.Y. 2003) (unpublished) (finding alter ego allegations sufficient to withstand motion for dismissal); *Pac. Mar. Freight, Inc. v. Foster*, No. 10–CV–0578–BTM–BLM, 2010 WL 3339432, *6 (S.D. Cal. Aug. 24, 2010) (unpublished) (noting that "[t]he identification of the elements of alter-ego liability plus two or three factors has been held sufficient to defeat a 12(b)(6) motion to dismiss").

Here, no discovery has been conducted, and Defendant has come forward with no evidence but for a single conclusory declaration. Most, if not all, of the facts relating to the existence of an alter ego relationship are uniquely within the control of Defendants. It would be impractical and inequitable to require Plaintiff to make detailed factual averments regarding an alter ego claim prior to conducting discovery on that issue. But even without the benefit of discovery, Plaintiff has sufficiently set forth allegations to state an alter ego claim.

Under Utah law, courts apply a two-prong test to determine whether a party may pierce a corporate veil. *See Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39, ¶ 14, 284 P.3d 630. First, Plaintiff must show that there is "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, *viz*., the corporation is, in fact, the alter ego of one or a few individuals." *Id.* This is known as the "formalities" requirement. *Id.* Second, Plaintiff must show that "the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." *Id.* This is the "fairness requirement." *Id.* The Utah Supreme Court has adopted eight non-exclusive factors to aid in determining whether the alter ego test has been met:

> (1) undercapitalization of a one-man corporation; (2) failure to observe corporate formalities; (3) nonpayment of dividends; (4) siphoning of corporate funds by the dominant stockholder; (5) nonfunctioning of other officers or directors; (6) absence of corporate records; (7) the use of the corporation as a facade for operations of the dominant stockholder or stockholders; and (8) the use of the corporate entity in promoting injustice or fraud.

Id. at ¶¶ 16-17.

In a parent-subsidiary relationship, an analogous 11-factor test is often used for determining whether the veil should be pierced. These criteria include:

(1) the parent corporation owns all or most of the capital stock of subsidiary

(2) the parent and subsidiary corporations have common officers or directors
(3) the parent corporation finances the subsidiary
(4) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation;
(5) the subsidiary has grossly inadequate capital;
(6) the parent corporation pays the salaries and other expenses or losses of the subsidiary;
(7) the subsidiary had substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation;
(8) in the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own;
(9) the parent corporation uses the property of the subsidiary as its own;
(10) the directors or executives of the subsidiary to not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest; and
(11) the formal legal requirements of the subsidiary are not observed.

See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 47 (Utah Ct. App. 1988)) (approving eleven-factor test in parent/subsidiary relationship) (citing *U.S. v. Advance Mach. Co.*, 547 F.Supp. 1085, 1093 (D. Minn. 1982)). A party need not show (nor allege) all of the above factors to establish an alter ego claim because a strong showing on even a single factor may have conclusive weight. *Jones & Trevor*, 2012 UT 39 at ¶ 24.

In this case, where Plaintiff alleges facts that address not just a few, but several, of the alter ego factors, the allegations of the Complaint are more than sufficient to satisfy the pleading standards for alter ego. And even if the Court elects to consider matters outside the pleadings, the motion for dismissal should be denied. As discussed above, ATI does not dispute most of the alter ego allegations of the Complaint – including those that allege common management,[13]

[13] In conclusory fashion, ATI states that "ATI does not oversee the day-to-day operations of ATI-Ti; rather, these activities are managed by ATI-Ti's employees and management team." However, ATI does not provide any information about who did what, and how major decisions

common headquarters, non arm's-length transactions, joint financial reports, governance over the subsidiary in the interest of the parent, reference to the subsidiary's assets as ATI's own assets, etc. *ATI does not dispute that ATI-Ti acted as its agent in the forum.* And again, ATI does not dispute that it made the decision to idle the Rowley plant. By this fact alone, the Court can infer ATI's substantial control over the Utah facility, and blurred lines of authority; it shows "the use of the corporation as a façade for operations of the dominant stockholder." Additional evidence that ATI-Ti produced product only for ATI; that ATI-Ti's operations prominently featured the ATI logo; that officers and executives of ATI conducted all the negotiating and deal-making on behalf of the subsdiary, only makes the case more clear.

It was ATI that chose to bypass contractually-defined procedures and perfunctorily declare the contract terminated, subjecting ATI-Ti to a claim for upwards of a hundred million dollars in damages. Standing alone, ATI-Ti will likely be unable to pay a judgment to US Mag. But, ATI has no apparent concern about this; the subsidiary was only a dummy corporation, set up in Utah to run the Rowley facility on ATI's behalf. If the contract with US Mag is breached and terminated, and if US Mag obtains a judgment, ATI can bankrupt ATI-Ti, close the business, and simply move on, pursuing new opportunities in some other forum, setting up some new sham entity for purposes of entering into a new agreements. Meanwhile, US Mag will be left to unilaterally suffer the consequences. ATI's decision worked *entirely* to the benefit of ATI, and to the detriment of even its own subsidiary. The Court should not permit this wrong. As alleged in the Complaint, "an injustice would result unless the separate legal existences of ATI-Ti and

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were made for ATI-Ti. ATI does not specifically contest that the two entities had executives and officers in common. Nor does it contest that major decisions were made by ATI.

ATI are disregarded and they are held jointly and severally liable for the damages claimed herein."

The declarations submitted by Plaintiff – which provide specifics about ATI's dominance and control over ATI-Ti, common management, common logos, treatment of ATI-Ti as just a "department" or "division," and ATI's actions in idling the Rowley plant, etc., make the case all the more compelling.

At this early stage, the allegations of the Complaint and the facts set forth in the declarations submitted by Plaintiff are sufficient to support a prima facie case for alter ego, and are therefore sufficient to withstand a motion for dismissal under Rule 12(b)(6).

D. DISCOVERY SHOULD BE PERMITTED ON BOTH THE JURISDICTIONAL ISSUE AND THE SUBSTANCE OF THE ALTER EGO CLAIM.

At minimum, this Court should allow discovery on both the jurisdictional issue and on the alter ego issue.

As further discussed in Plaintiff's separate Rule 56(d) motion, filed concurrently herewith, discovery is appropriate where it appears from the allegations of the Complaint that there are material factual issues that bear on whether a jurisdiction-based dismissal is appropriate. *Sizova v. Nat. Institute of Standards & Technology*, 282 F.3d 1320, 1326 (10th Cir. 2002) ("When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion … [and] a refusal to grant discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant."). Further, if the Court elects to treat the motion under Rule 12(b)(6) as a motion for summary judgment, it should "liberally" permit discovery. *See* Fed. R. Civ. P. 56(d); *Patty Precision v.*

Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984) ("An affidavit under Rule 56(d) should be treated liberally unless dilatory or lacking in merit.).

On the limited record before this Court, and particularly when Defendant ATI has unique control of pertinent information, this Court should not order dismissal, but instead should permit discovery and let this case be resolved on its merits.

Defendant's motion should be denied.

CONCLUSION

For the foregoing reasons, Defendant Allegheny Technologies Incorporated's Motion for dismissal should be denied.

DATED this 3rd day of January, 2017.

BURBIDGE MITCHELL & GROSS

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